No. 21097

In the

United States Court of Appeals For the Ninth Circuit

UNITED PACIFIC INSURANCE CO.,
Appellant,

vs.

THE IDAHO FIRST NATIONAL BANK,
Appellee

THE IDAHO FIRST NATIONAL BANK,
Cross-Appellant,

vs.

UNITED PACIFIC INSURANCE CO.,
Cross-Appellee.

BRIEF OF APPELLEE

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

J. DENNIS FAUCHER
W. E. SULLIVAN
LANGROISE, CLARK & SULLIVAN
Attorneys for Appellee
300 Simplot Building
Boise, Idaho

No. 21097

In the

United States Court of Appeals For the Ninth Circuit

UNITED PACIFIC INSURANCE CO.,
Appellant,

vs.

THE IDAHO FIRST NATIONAL BANK,
Appellee

THE IDAHO FIRST NATIONAL BANK,
Cross-Appellant,

vs.

UNITED PACIFIC INSURANCE CO.,
Cross-Appellee.

BRIEF OF APPELLEE

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

J. DENNIS FAUCHER
W. E. SULLIVAN
LANGROISE, CLARK & SULLIVAN
Attorneys for Appellee
300 Simplot Building
Boise, Idaho

INDEX

TABLE OF CASES

STATUTES

No. 21097

In the

United States Court of Appeals For the Ninth Circuit

UNITED PACIFIC INSURANCE CO.,
Appellant,

vs.

THE IDAHO FIRST NATIONAL BANK,
Appellee

THE IDAHO FIRST NATIONAL BANK,
Cross-Appellant,

vs.

UNITED PACIFIC INSURANCE CO.,
Cross-Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellent's statement of the facts leaves much to be desired. It is impossible to understand the basis of the trial court's decision without knowing all of the facts.

For many years prior to the commencement of this suit Gem Creamery Company was a business located in Emmett, Idaho, approximately thirty miles from

Boise. This company was engaged in the business of selling butter, eggs and produce (Tr. Vol. 2, p. 78). The farm products were procured from farmers and then sold through routes (Tr. Vol. 2, pp. 77-80). Cream that was picked up was processed into butter for resale. In January of 1962, the business was purchased by Dwayne Doramus and Floyd Worley (Tr. Vol. 2, p. 22). Their banking was done with the Emmett, Idaho, branch of the First Security Bank of Idaho. While a checking account was maintained, payment of obligations was made by the use of drafts payable at the First Security Bank in Emmett. Drafts came into that bank in the regular course of bank clearing and these were accumulated throughout each day. At approximately three o'clock each afternoon one of the principals in the business would go to the bank and write a check to cover the drafts that were to be honored. By that time of the day the bank would have run a tape on the drafts received that day. These daily checks to the bank were the only checks that were written on the checking account (Tr. Vol 2, pp.22-26).

The number of drafts increased drastically from January, 1962, to February, 1963. While in January, 1962, 170 Gem Creamery drafts went through the First Security Bank, in February of 1963, the number totaled 2,213. The buildup in the number of drafts was consistent through the period of fourteen months. For example, the number in August of 1962, was 1,649 (Tr. Vol. 2, pp. 26-29).

The dollar volume represented by the drafts increased accordingly. This volume is shown by Plaintiff's Exhibit 8. This exhibit shows the amount of each daily check written to the bank to cover drafts (Tr. Vol. 2, p. 29).

The increase in the number of drafts and in the amount of them was caused by something other than an increase in the business of Gem Creamery. From the middle of 1962 on employees were cashing drafts and returning the proceeds to the partners (Tr. Vol. 2, p. 72). Every few days employees were given from one to eight drafts and told to cash them and return the proceeds. Each draft would be made out in favor of the employee who was to cash it. The drafts would be cashed at banks, clothing stores and grocery stores, among other places. At grocery stores it was customary for an employee to purchase cigarettes or soft drinks. Any part of the proceeds that had been so spent had to be paid back to the partners along with the remainder of the proceeds (Tr. Vol. 2, pp. 72-74, 83-85).

Most, if not all, of the six to eight steady employees cashed drafts in this manner (Tr. Vol. 2, pp. 75, 85). The extent to which the employees were used for this purpose is illustrated by the fact that one of the former employees who testified to having cashed drafts in this manner every few days was primarily a butter-maker (Tr. Vol. 2, p. 77), and the other was a handyman and butter-cutter (Tr. Vol. 2, p. 83).

The bubble burst in late February of 1962. Drafts were first dishonored on February 25, 1963 (Tr. Vol. 2, p. 31). In all approximately 450 drafts were dishonored and returned unpaid during the period from February 25, 1963, to March 5, 1963 (Tr. Vol. 2, p. 33-35; Pl. Ex. 9). The dollar amount of these drafts was approximately $80,000. All but a few of the dishonored drafts were drawn payable to the order of an employee of Gem Creamery (Tr. Vol. 2, pp. 75-77).

Almost all of the dishonored drafts contained endorsements indicating they were cashed at department stores, grocery stores, drug stores or banks (Tr. Vol. 2, pp. 35-38; Pl. Ex. 9).

Appellee, The Idaho First National Bank, suffered a loss at its Broadway Office in Boise, Idaho, in the amount of $4,683.00 due to its having cashed drafts which were dishonored (Amended Finding of Fact XII; Tr. Vol. 1, p. 55; Pl. Exs. 2 and 2-2M). Fourteen drafts were involved, all of which were dated either February 19, or February 20, 1963. The only endorsement on each draft was that of the payee — in each case an employee of Gem Creamery (Pl. Exs. 2 and 2-2M; Tr. Vol. 2, pp. 75-77).

The same thing happened at another Boise office of appellee, its Capital Office. The loss there was $5,801.46 (Amended Finding of Fact XIII; Tr. Vol. 1, p. 55); twenty drafts were dishonored; the drafts contained dates of February 16, 18, 19, and 20, 1963; and only endorsements were those of the payee — in each case an employee of Gem Creamery (Pl. Exs. 3 and 3-3S; Tr. Vol. 2, pp. 75-77).

The facts leading up to the loss are the same in regard to both branches. Gem Creamery drafts were first cashed during the Fall of 1962 (Tr. Vol. 3, pp. 4, 13, 27, 28). At the Capital Office sixty to seventy-five had been cashed by one teller and they were all honored (Tr. Vol. 3, p. 4). Ninety to one hundred were cashed by one teller at the Broadway Office and they were all honored (Tr. Vol. 3, pp. 13, 14). The drafts were cashed by the payees and were endorsed in the presence of the tellers (Tr. Vol. 3, pp. 7, 14, 21, 27, 28).

As to the drafts which were dishonored, the procedure was the same. When drafts were taken which were later dishonored, the tellers handled them as cash items on the assumption that they were checks (Tr. Vol. 2, p. 97; Tr. Vol. 3, pp. 7, 8, 16, 17, 24, 27, 28). One reason for this is that the drafts were practically identical in form to checks (Pl. Exs. 2 and 2-2M; 3 and 3-3S).

While there is no evidence of any verbal representations having been made at the time of cashing the dishonored drafts, false representations were made at earlier times. There was one instance when a representation was made that a draft was in payment for dairy products (Tr. Vol. 3, p. 5). Twice representations were made at grocery stores that the drafts were paychecks (Tr. Vol. 2, pp. 51, 58).

Other businesses suffered in a manner similar to appellee. Managers of two grocery stores testified that drafts were cashed over a considerable period of time without a problem, and that a much greater number of drafts than normal were cashed in the week ending February 20, 1962, and that all of these were dishonored (Tr. Vol. 2, pp. 43-62). Another bank suffered losses at two of its branches, and the facts were similar to those involved in appellee's losses (Tr. Vol. 2, pp. 63-69).

By the time the affairs of Gem Creamery were settled in bankruptcy, the unsecured creditors received a return of 0.002784% on their claims (Tr. Vol. 2, p. 47).

SUMMARY OF ARGUMENT

Appellant's brief clearly states the contention of

appellee and the basis for the judgment by the trial court in appellee's favor — that there was a loss of property by reason of cashing the drafts and that the loss was one suffered through false pretenses.

There are two type of false pretenses present here. The entire operation of Gem Creamery, and particularly its method of using drafts, was a false pretence — one calculated to lull the public into cashing more and more drafts until the inevitable happened. In addition the cashing of the drafts was a representation that there were funds to honor them.

Appellant contends that forgery is involved. There is no basis for such contention.

ARGUMENT

I. *The Method of Operation Constituted a False Pretense.*

A substantial portion of the brief submitted by appellant concerns itself with the distinction between checks and drafts, and with the requirements for a criminal conviction for the crime of false pretenses. What appellant has neglected to do is to show in what respects the evidence does not support the specific findings of false pretenses made by the trial court.

In the Amended Findings of Fact and Conclusions of Law (Tr. Vol. 1, pp. 51-59) there are specific findings of all of the elements appellant contends must be present to constitute false pretenses. These specific findings are as follows:

XVI

"By the actions and deliberate course of conduct

of itself and its employees Gem Creamery Company impliedly represented to plaintiff statements of existing fact, to wit: that the drafts which were later dishonored were issued in the regular course of business, and that it had funds or credit for the payment of the drafts cashed by plaintiff which were later dishonored.

XVII

"Gem Creamery Company did not have funds or credit for the payment of the drafts cashed by plaintiff which were dishonored, and said drafts were not issued in the regular course of business.

XVIII

"Gem Creamery Company knew that the said implied representations were untrue and said misrepresentations were adapted to induce the plaintiff to part with money.

XIX

"Plaintiff relied on the the false representations of Gem Creamery Company and the loss was in fact caused by said false representations and false pretenses." (Tr. Vol. 1, pp. 6, 7)

Because of these findings, any distinctions between drafts and checks are only academic. The representations that the drafts were issued in the regular course of business and that there were funds or credits for the payment of them did not relate to future acts — they related to past and present representations.

The findings are supported by the evidence presented. The representations were implied from *all* of the actions of Gem Creamery and its employees. These actions include the use of drafts which closely resembled checks, the increase in the number of drafts cashed, and the large loss suffered by appellee and others. More importantly, every element of the scheme was intended to, and did, lull appellant into cashing the drafts until finally the two branch banks took thirty-four drafts within the period of a few days. This was explained to the trial court when appellant objected to the admission of testimony relating to the manner in which Gem Creamery dealt with the Emmett Branch of First Security Bank.

> "MR. FAUCHER: It is our contention that the entire method of doing business was in fact a false pretense calculated to misrepresent their ability to pay and to misrepresent their financial condition." (Tr. Vol. 2, p. 24)

After the submission of all the evidence and the consideration of it as a whole, the trial court agreed.

II. *The Cashing of the Drafts Constituted a False Pretense.*

The same findings of the elements of false pretenses can be supported in a slightly different manner. The presentment of the drafts was a representation that there were funds or credits for payment.

Since there are no cases based on bankers blanket bonds which involve false pretenses through drafts, it is necessary to consider the case law relative to dis-

honored checks and to proceed from there. Starting with *Hartford Accident & Indemnity Co. v. Federal Deposit Ins. Corp.*,204 F2d 933 (8th Cir. 1953) and *Fidelity and Casualty Company v. Bank of Altenburg*, 216 F2d 294 (8th Cir. 1954), the courts have uniformly held the insurance companies liable for loss caused by check-kiting on the basis that it constitutes false pretenses. The decisions invariably disclose that the type of bond involved was a Bankers Blanket Bond, Form 24, the same one issued by appellant to appellee in this instance. *Indemnity Insurance Co. v. Pioneer Valley Savings Bank*, 343 F2d 634 (8th Cir. 1965); *United States v. Western Contracting Corporation*, 341 F2d 383 (8th Cir. 1965); *Pioneer Valley Savings Bank v. Indemnity Insurance Co.*, 225 F. Supp. 404 (D.C. Iowa 1964).

Check-kiting in its simplest form is the drawing of a check on X bank and the cashing of it with Y bank, with the drawee then depositing the proceeds in X bank to cover the check when it comes through. Y bank can be lulled into cashing larger and larger checks by the fact that they are always honored by X bank. On the other hand it can involve accounts in two different banks, as was the case in the Brazeau-Altenburg loss. *Hartford Accident & Indemnity Co. v. Federal Deposit Ins. Corp., supra,* and *Fidelity and Casualty Company v. Bank of Altenburg, supra.*

Appellant's contention that the instruments constituted promises to pay in the future instead of representations of existing fact is neither new nor novel. It was also raised in some of the check-kiting cases. In *Fidelity and Casualty Company v. Bank of Altenburg, supra,* the contention was made by the insurance company and the Court of Appeals rejected it.

"Defendant says that Schneier's representation to plaintiff bank was in effect that the checks he deposited with it drawn on the Brazeau Bank would be paid when presented to that bank. It says that was a representation of a promissory nature of a future, not an existing fact. But that is not the manner in which the plaintiff's officials construed Schneier's conduct in presenting the checks to it for deposit. The representation implied was that sufficient funds were on deposit to meet the checks. That was a representation of a present existing fact." 216 F2d at 301.

Likewise, after the District Court had ordered dismissal of a suit brought under the "false pretenses" clause of a bond on the ground that the taking of a check involved no representation, the Court of Appeals in *United States v. Western Contracting Corporation*, 341 F2d 383 (8th Cir. 1965), reversed, holding that the requisite misrepresentation was present. According to the stipulated facts (341 F2d at 386), there is no indication that any written or verbal representations were made — the wrongdoer merely deposited checks in his account with the bank and was allowed to draw against the deposits prior to collection. This in itself brought the loss within the policy definition of "false pretenses."

"There can be no question that the giving of the checks constituted a representation that the checks were good. Such representation was relied upon by the Bank in permitting H. K. to draw on uncollected funds . . . The loss resulted from the false pretenses . . . We are satisfied that the transactions fall within the false pretense coverage of the blanket bond executed by Globe." 341 F2d at 390.

Among the additional cases supporting the proposition that the giving of a worthless check constitutes false pretenses are *Pioneer Valley Savings Bank v. Indemnity Insurance Co., supra,* affirmed in *Indemnity Insurance Co. v. Pioneer Valley Savings Bank, supra,* and *Landwehr v. United States,* 304 F2d 217 (8th Cir. 1962), which affirmed a conviction for transporting a stolen motor vehicle in interstate commerce. In this last cited case the government had contended that the writing and tendering of a check was itself a representation that there were sufficient funds in the account and that it would be paid. The District Court and the Court of Appeals agreed with the contention.

As shown particularly by *Fidelity and Casualty Company v. Bank of Altenburg, supra,* and *United States v. Western Contracting Corporation, supra,* the important factor is the manner in which the bank considered the instruments. In these two cited cases the checks were deposited for credit and then drawn against, and still the implied representation was held to be present because the banks construed the actions of the depositors to mean that funds were on hand to honor the checks. In the instant case there is even more evidence of the implied represenation than in those cases. Here the drafts were treated as cash items and cash was given to the payees. Here there was no crediting to an account which could later be charged back if the instruments proved to be uncollectible.

If, as the cases indicate, the manner in which the instruments are considered and handled by the bank is the determinative factor, there is no reason to distinguish between drafts and checks. Appellant has contended that there is a technical distinction between

checks and other types of bills. This is true, and there are probably occasions when the distinction is important. Here it is not.

There are various types of drafts, and they are used for different purposes. A sight draft or a time draft is often used in connection with goods shipped under a negotiable bill of lading. The purchaser or his bank can accept the draft after all credit arrangements have been made and after the goods have been examined. On the other hand, large casualty insurance companies use drafts in payment of claims and these circulate and are accepted as readily as any checks. The appellant here uses such drafts. Presumably the reason why drafts are used for this purpose is that it gives the insurance company the opportunity to carefully examine the back of the instrument where the releases of further liability are contained.

There is no magic in a check. Unless it is certified by the drawee bank, payment can be stopped by the drawer at any time prior to presentment, and the drawer can withdraw the funds while the check is enroute to the bank. From the viewpoint of the person cashing an instrument there is no distinction between the type of drafts involved here and uncertified checks. A lack of funds in back of them will cause a loss. In one case inaction (failure to honor) and in the other case action (stopping payment or withdrawal) will cause a loss. Appellee treated the drafts here as cash items—the same way that checks would have been treated. The course of conduct that had existed between appellee and Gem Creamery caused appellee to rely on the implied representation that funds or credits were available to honor them.

In all of the federal civil cases thus far cited the question of whether or not criminal statutes are controlling has been raised. This is important here because most, if not all, of the cases cited by appellant are criminal cases. In most of these cases the courts were able to bypass the issue. Likewise in the instant case it will be shown later that the crime was committed under the provisions of Idaho law. However, the proposition that the requisites necessary for conviction need not be proven is supported by *Pioneer Valley Savings Bank v. Indemnity Insurance Co., supra,* where the court, in addition to citing other cases, said that strong support is made for the proposition in *Fidelity and Casualty Company v. Bank of Altenburg, supra.*

Moving to the Idaho criminal statutes, several cases support the proposition that the making or passing of worthless checks constitutes the crime of false pretenses.

State v. Roderick, 375 P2d 1005, 85 Idaho 80 (1962);

State v. Davis, 336 P2d 692, 81 Idaho 61 (1959);

State v. Larsen, 286 P2d 646, 76 Idaho 528 (1955);

*State v. Campbell,*219 P2d 956, 70 Idaho 408 (1950).

Two of the cases, *State v. Roderick, supra,* and *State v. Campbell, supra,* stand for the proposition that the only distinction between *Idaho Code* Sec. 18-3101 (which provides that false pretenses is a felony) and Sec. 18-3106 which concerns drawing and passing instruments and also provides for prima facie evidence)

is that Sec. 18-3101 may only be used where ". . . the accused *obtained* money or property by means of false pretenses." (emphasis added) 375 P2d at 1007. On the other hand a person can be convicted of a violation of Sec. 18-3106 even if the making or passing of the instrument does not result in the accused having obtained anything. *State v. Campbell, supra.*

Idaho Code Sec. 18-3106 is set out in the Appendix together with other applicable Idaho statutes. In part that section provides that "As against the maker or drawer thereof, the making, drawing, uttering or delivering of such check, draft or order as aforesaid shall be prima facie evidence of intent to defraud and of knowledge of no funds or insufficient funds, as the case may be, in or credit with such bank, or depositary, or person, or firm, or corporation, for the payment in full of such check, draft or order upon its presentation." In *State v. Davis, supra*, and in *State v. Larsen, supra*, the Idaho Supreme Court approved instructions which applied the prima facie evidence of Sec. 18-3106 to prosecution for violations of Sec. 18-3101.

> "Where as in this case a worthless check is issued as the false token to accomplish the fraudulent purpose, such instruction is proper. Sec. 18-3106, I.C.; State v. Larsen, 76 Idaho 528, 286 P2d646. " 336 P2d at 695.

Some explanation of the prima facie provision is contained in *State v. Campbell, supra.* There the defendant contended that since both intent to defraud and knowledge of the non-existence of sufficient funds or credit are presumed there is a presumption based on a presumption. The court answered by saying, "The

statute in question does not base a presumption upon a presumption but provides for two separate presumptions based upon the fact of the making or uttering of the check without funds or credit for its payment." 219 P2d at 959.

The Idaho Supreme Court is not alone in applying such a statute and its provisions to a false pretense situation. It has been done by federal courts in suits brought to recover losses alleged to have been caused by false pretenses under the provisions of bankers blanket bonds. In *Indemnity Insurance Co. v. Pioneer Valley Savings Bank, supra,* and *Pioneer Valley Savings Bank v. Indemnity Insurance Co., supra,* Section 28-1213 of the Iowa Code (the equivalent of *Idaho Code* Sec. 18-3106) was involved. In *United States v. Western Contracting Corporation, supra,* two sections of Nebraska law were involved. Section 28-1213 was equivalent to the first part of *Idaho Code* Sec. 18-3106, while Section 28-1241 contained the presumptions which are stated in the Idaho statute. Not only did the Court of Appeals apply the two statutes to the claim for recovery under the bond, but it emphatically stated that the presumptions controlled.

> "The record conclusively shows that $55,000 in H. K. checks deposited in plaintiff's bank were dishonored for lack of funds. Proof of presentment for payment, nonpayment, and protest is uncontested. Under Sec. 28-1214 the nonpayment of such checks created a rebuttable presumption of intent to defraud and knowledge of insufficient funds or credit in such bank. We find in the record no substantial evidence to rebut the presumption . . .
>
> "There can be no question that the giving of the

checks constituted a representation that the checks were good. Such representation was relied upon by the Bank in permitting H. K. to draw on uncollected funds. The unrebutted presumption of Sec. 28-1214 establishes evidence of intent to defraud and knowledge of insufficient funds or credit to take care of the checks. The loss resulted from the false pretense. The basic error committed by the trial court on this ground is its failure to give recognition to the rebuttable presumption created by Sec. 28-1214. We are satisfied that the transactions fall within the false pretense coverage of the blanket bond executed by Globe." 341 F2d at 389, 390.

The Idaho statute, Sec. 18-3106, is not limited to checks. It specifically applies to drafts. There can be no question but what a draft whether drawn on another person or on the drawer itself, is treated exactly the same as a check.

Inferentially, one of the Idaho cases can also be used to show that the future presentment aspect of a draft does not mitigate against such an instrument being the basis for a false pretense action. In *State v. Larsen, supra,* the defendant was convicted of the crime of false pretenses (Sec. 18-3601) based on his passing a post dated check.

"If, as appellant contends, it was post dated one day, he did not direct attention to such fact nor ask the payee to hold the check, or otherwise in any manner indicate that the check was not a valid order for the immediate payment of money. It was given and accepted as a valid order for the present payment of $2,000. The appellant knew he had no funds or

credit in the drawee bank at the time the check was delivered, nor thereafter." 286 P2d at 647.

While on the subject of Idaho law, one more observation can be made concerning the lack of difference between checks and drafts. The Uniform Negotiable Instruments Law (Idaho Code Sec. 27-101 et seq.) contains no provision which differentiates a check from any other type of draft or bill.

III. *The Drafts Are Not Forgeries.*

Appellant has made an attempt to convince the court that forgery is involved here. The substance of the argument is that the drafts were false instruments because they were not honored.

The cases cited in support of the argument have nothing in common with this factual situation. *Ex Parte Hibbs*, 26 Fed. 421 (D.C. Ore. 1886), involved the age-old problem of the ficticious payee. Hibbs, a postmaster, advised the government that certain money orders had been purchased by person who did not exist. Hibbs then indorsed the money orders in the names of the ficticious payees. In the instant case there were no ficticious payees and there is no evidence even hinting that the names contained on the front and back of the drafts were other than the signatures of the persons who purported to sign them.

Also cited is *Peoples Bank & Trust Co. v. Fidelity & Casualty Co.*, 57 SE2d 809, 231 N.C. 510, 15 ALR2d 996 (1950). There a man who did not have an account at the bank discovered that his signature would pass for that of another man who did have an account at

that bank. The situation here is not the least bit analogous. Here there was no attempt to have the instruments pass for those of another party, and no attempt to have a signature pass for that of someone else.

There are cases which have become before the courts wherein the contention has been made that invoices listing non-existent sales are forgeries. Such a contention is certainly more logical than appellant's. Even there, however, the rule of law is that there is no forgery as that term is used in a bankers blanket bond.

First National Bank of South Carolina v. Glens Falls Ins. Co., 304 F2d 866 (1962);

State Bank of Poplar Bluff v. Maryland Casualty Co., 289 F2d 544 (8th Cir. 1961);

Pasadena Investment Co. v. Peerless Casualty Co., 282 P2d 124, 132 Cal. App.2d 328 (1955).

For definitions of "forgery" as the term is used in bankers blanket bonds and for the citation of cases holding certain acts not to constitute forgery, appellee refers the court to Brief of Cross-Appellant submitted by appellee herin in connection with the cross-appeal from this action (Brief of Cross-Appellant, pp. 12, 13).

At the trial of this action no evidence was offered questioning the validity of any signatures, nor was any offered questioning the authority of any person to sign. The burden was on the insurance company (appellant) to prove than an exclusion in the policy allowed it to avoid liability. *O'Neil v. New York Life Ins. Co.*, 152 P2d 707, 65 Idaho 722 (1944).

CONCLUSION

Appellee respectfully requests that the judgment granted in its favor be affirmed. It is supported by the evidence presented and by the applicable law.

Respectfully submitted,

J. DENNIS FAUCHER
W. E. SULLIVAN
LANGROISE, CLARK & SULLIVAN
Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Dennis Faucher, Attorney

ACKNOWLEDGEMENT OF SERVICE

The undersigned, attorneys of record for appellant herein, hereby acknowledge receipt of three copies of the foregoing brief this ____ day of November, 1966.

CLEMONS, SKILES & GREEN

By _____
Attorneys for Appellant

APPENDIX

Idaho Code, Section 18-3101. Every person who knowingly and designedly by any false or fraudulent representation or pretense, defrauds any other person of money, labor or property, whether real or personal, or obtains the signature of another to any instrument in writing whereby any liability is created, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently get possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or the value of the property so obtained; and the reasonable value of any labor or services and the amount of the liability created by any written instrument shall be taken as the value of such labor or services or of such written instrument.

Idaho Code, Section 18-3106. (a) Any person who for himself or as the agent or representative of another or as an officer of a corporation, wilfully, with intent to defraud shall make or draw or utter or deliver, or cause to be made, drawn, uttered, or delivered, any check, draft or order for the payment of money upon any bank or depositary, or person, or firm, or corporation, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has no funds in or credit with such bank or depositary, or person, or firm, or corporation, for the payment in full of such check, draft or order upon its presentation, although no express representation is made with reference thereto, shall upon conviction be punished by imprisonment in the state prison for a term not to

exceed three years or by a fine not to exceed $5,000.00 or by both such fine and imprisonment.

(b) Any person who for himself or as the agent or representative of another or as an officer of a corporation, wilfully, with intent to defraud shall make, draw, utter or deliver, or cause to be made, drawn, uttered or delivered, any check, draft or order for the payment of money in the sum of $25.00 or more, upon any bank or depositary, or person, or firm, or corporation, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has some but not sufficient funds in or credit with such bank or depositary, or person, or firm, or corporation, for the full payment of such check, draft or order upon its presentation, although no express representation is made with reference thereto, shall upon conviction be punished by imprisonment in the state prison for a term not to exceed three years, or by a fine not to exceed $5,000.00, or by both such fine and imprisonment.

(c) Any person who for himself or as the agent or representative of another or as an officer of a corporation, wilfully, with intent to defraud, shall make, draw, utter or deliver, or cause to be made, drawn, uttered, or delivered, any check, draft or order for payment of money, in a sum less than $25.00 upon any bank or depositary, or person, or firm, or corporation, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has some but not sufficient funds in or credit with such bank or depositary, or firm, or person, or corporation, for the full payment of such check, draft or order upon its presentation, although no express representation is made with reference thereto, shall upon conviction for a first

offense be punished by imprisonment in the county jail for a term not exceeding six months, or by a fine not exceeding $300.00 or by both such fine and imprisonment; and upon a second conviction the person so convicted shall be punished by imprisonment in the county jail for a term not exceeding one year, or by a fine not exceeding $1,000.00, or by both such fine and imprisonment; provided, however, that upon a third or subsequent conviction, the person so convicted shall be punished by imprisonment in the state prison for a term not exceeding three years, or by a fine not exceeding $5,000.00, or by both such fine and imprisonment.

(d) As against the maker or drawer thereof, the making, drawing, uttering or delivering of such check, draft or order as aforesaid shall be prima facie evidence of intent to defraud and of knowledge of no funds or insufficient funds, as the case maye be, in or credit with such bank, or depositary, or person, or firm, or corporation, for the payment in full of such check, draft or order upon its presentation. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depositary, or person, or firm, or corporation upon whom such check, draft or order is drawn for the payment of such check, draft or order.